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No. 91-1762

In The

Supreme Court of the United States

October Term, 1991

REGIONAL CONSTRUCTION COMPANY, et al.,

Petitioners,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF EMPLOYMENT SERVICES, et al.,

Respondents.

On Petition For Writ Of Certiorari To The District Of Columbia Court Of Appeals

BRIEF FOR INTERVENOR MICHAEL D. BAKER IN OPPOSITION

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QUESTION PRESENTED

Did the District of Columbia Court of Appeals err in ruling that the petitioners had suffered no prejudice notwithstanding the District of Columbia Department of Employment Services' technically defective notice of a formal hearing in a workers' compensation case, where petitioners had received *actual* notice of a pre-hearing conference, had advance knowledge of a formal hearing, and participated in the formal hearing?

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INTRODUCTION

This case presents the question of whether the petitioners were denied due process of law by the District of Columbia's Department of Employment Services' technically deficient notice to them of a pre-hearing conference in a workers' compensation case where the attorney whom the petitioners retained one day after the pre-hearing conference had received notice of the pre-hearing conference, had received notice of the date of the formal hearing nearly two months in advance thereof, and the petitioners were allowed to fully participate in the formal

hearing including the submission of evidence. The decision below is a correct application of the doctrine of harmless error and raises no novel question warranting plenary review by this Court.

STATEMENT OF THE CASE

Intervenor, Michael D. Baker, initially filed a workers' compensation claim for his injuries of January 5, 1987 in the State of Maryland. Petitioner, The Hartford Accident and Indemnity Company, voluntarily paid him workers' compensation benefits for a period of several months in connection with his Maryland claim. Petitioner' counsel, the law firm of Dirska & Levin and attorney W. Stanwood Whiting, Esquire of that firm represented the petitioners in connection with the Maryland claim from its inception.

Intervenor filed a workers' compensation claim for the same injury in the District of Columbia on or about August 27, 1987.

In February of 1988, intervenor's counsel sent a letter to one of the other attorneys of the firm of Dirska & Levin stating that he believed jurisdiction to lie in the District of Columbia and asking whether the carrier would voluntarily accept jurisdiction in the District of Columbia. Neither the workers' compensation carrier or its attorneys advised intervenor's attorneys that the law firm of Dirska & Levin would not be representing the petitioners in any District of Columbia workers' compensation proceedings.

Throughout a course of correspondence between claimant's attorneys and the law firm of Dirska & Levin, neither the petitioner's attorneys nor the petitioner itself advised intervenor's counsel that Dirska & Levin was not retained in connection with any District of Columbia claim the intervenor might initiate.

When intervenor's counsel filed his application for a formal hearing with the District of Columbia Department of Employment Services, he identified the law firm of Dirska & Levin as counsel for the employer and insurer. W. Stanwood Whiting, Esquire of Dirska & Levin admits receiving this application for a formal hearing yet he did not advise intervenor's counsel that his firm was not the appointed representatives of the petitioners in connection with the District of Columbia case.

The District of Columbia Department of Employment Services sent its notice of a pre-hearing conference to Mr. Whiting and did not send it to either of the petitioners directly. A pre-hearing conference was scheduled for November 15, 1988. Attorney Whiting admits receiving notice of said hearing. On the date of the pre-hearing conference, neither Mr. Whiting nor any other member of his firm nor any representative of the employer or insurer appeared on behalf of the petitioners. No pre-hearing statement was ever filed on behalf of the petitioners.

After the pre-hearing conference at which the Hearing Examiner ruled that the matter would be scheduled for ex-parte proof due to the non-appearance of the employer and insurer, intervenor's counsel contacted Mr. Whiting by telephone and reported what had transpired at the pre-hearing conference and advised that the case

was scheduled for ex-parte proof on January 11, 1989. Intervenor's counsel thereafter confirmed his advice in writing the following day. Mr. Whiting also acknowledges receiving a copy of intervenor's correspondence.

Mr. Whiting and the law firm of Dirska & Levin claim not to have been formally retained by the petitioners until November 16, 1988, one day after the pre-hearing conference, to represent the petitioners' interests in connection with the District of Columbia proceedings. Thereafter, nearly two months elapsed before defense counsel even requested a postponement of the hearing scheduled for January 11, 1989. During this time, defense counsel failed to file any motions or other pleadings seeking either a continuance of the formal hearing or a reconsideration of the Hearing Examiner's decision to set the case for ex-parte proof. Defense counsel failed to avail themselves of the opportunity to conduct discovery nor did they subpoena witnesses for the upcoming hearing.

On the date of the hearing, the Hearing Examiner declined defense counsel's oral request for a continuance but agreed to permit defense counsel to present any evidence he wished and to fully cross-examine the claimant.

Defense counsel presented no witnesses at the hearing but did submit a wage schedule and attachments thereto pertaining to intervenor's employment.

The Hearing Examiner issued a Compensation Order awarding intervenor workers' compensation benefits on February 16, 1989.

The petitioners appealed that Compensation Order to the Director of the Department of Employment Services which office affirmed the Compensation Order. Petitioners then sought review in the District of Columbia Court of Appeals which affirmed the decision of the Director on December 20, 1991. From the Order of the District of Columbia Court of Appeals, the petitioners seek a Writ of Certiorari from this Court.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Petitioners were not denied their due process rights under the circumstances of this case since they had actual notice of a formal hearing, advance knowledge of the date of the formal hearing, and were permitted full participation in the formal hearing.

Petitioners' reliance upon the cases cited in their petition is misplaced. *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950) and *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988) are cases involving the issue of whether notice by publication sufficed for beneficiaries of a trust and creditors of an estate, respectively. In the case at bar, the petitioners are not challenging any statutes or regulations regarding the form of notice which must be given. Also, unlike the beneficiaries and creditors in the *Mullane* and *Tulsa* cases, the petitioners received *actual* notice of the hearing in question.

In the instant case, the attorney whom the petitioners eventually retained to represent them received the notice

of the pre-hearing conference. In the District of Columbia, no adjudications of compensability or of any other issues are made at the pre-hearing conference. The pre-hearing conference serves merely to clarify the issues to be adjudicated at the formal hearing, to apprise all parties of the witnesses and exhibits to be presented by the other party at the formal hearing, to set a cut-off date for discovery and to schedule a formal hearing date mutually agreeable to the parties and to the Hearing Examiner.

Although defense counsel received notice of the pre-hearing conference in advance thereof and had sufficient time to notify the petitioners of it, no one appeared at the pre-hearing conference on behalf of the petitioners.

No adjudication on the merits took place at this pre-hearing conference. On November 16, 1988, the day after the pre-hearing conference, petitioners' counsel received actual notice of the fact that the formal hearing was scheduled for January 11, 1989.

Petitioners had ample opportunity to prepare for the formal hearing. Although they could have promptly requested a continuance of the scheduled hearing or contested the Hearing Examiner's initial decision to set the case for ex-parte proof, the petitioners did neither. The only motion filed by petitioners was an oral request for a continuance of the hearing date which was not made until shortly before the hearing.

Notwithstanding the petitioners' failure to promptly request a continuance of the formal hearing or a reconsideration of the ex-parte format, the Hearing Examiner allowed the petitioners to fully participate in the formal hearing. Contrary to the petitioners' assertion, they did

submit evidence at the formal hearing. The petitioners also could have requested that the Hearing Examiner keep the record open post-hearing so that they might submit any additional evidence they deemed appropriate. The petitioners did not avail themselves of this procedure. For all of these reasons, the District of Columbia Court of Appeals found that the petitioners suffered no prejudice as a result of any defective pre-hearing notice and any error arising therefrom was harmless.

The instant case is also distinguishable from *Armstrong v. Manzo*, 380 U.S. 545 (1965) which involved a shifting of the burden of proof in adoption proceedings. In the case at bar, the burden of proof remained upon the intervenor at all times and the formal hearing at which the petitioners were allowed full participation, clearly eliminated any unfairness to the petitioners which might have resulted from the faulty pre-hearing conference notice.

In the case of *Walker v. Hutchinson City*, 352 U.S. 112, at 115 (1956), this Court recognized that in *Mullane, supra*, the Court called attention to the "impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions". This Court stated in *Mullane, supra*:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . The notice must be of such nature

> as reasonably to convey the required information, *Grannis v. Ordean, supra,* and it must afford a reasonable time for those interested to make their appearance, *Roller v. Holly, supra,* and *cf. Goodrich v. Ferris,* 214 U.S. 71. But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. *Id* at 314-315.

In the instant case, the petitioners had actual notice of the formal hearing well in advance thereof and had ample time and opportunity to prepare for the formal hearing and were in fact allowed to participate fully in the formal hearing. There has therefore been no denial of petitioners' due process rights which would warrant this Court's grant of a writ of certiorari in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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